

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

TIMOTHY MORGAN, Individually and on behalf of all)	
others similarly situated,)	Civil Action 1:03 cv 12529 JLT
)	
Plaintiff,)	
)	
v.)	
)	
NETWORK ENGINES, INC., JOHN CURTIS,)	
DOUGLAS G. BRYANT and LAWRENCE A.)	
GENOVESI,)	
)	
Defendants.)	

EDWIN POWELL MILLER, Individually and On behalf)	
of all others similarly situated,)	Civil Action 1:04 cv 10022 JLT
)	
Plaintiff,)	
)	
v.)	
)	
NETWORK ENGINES, INC., JOHN CURTIS,)	
DOUGLAS G. BRYANT and LAWRENCE A.)	
GENOVESI,)	
)	
Defendants.)	

Additional Captions to Follow

**MEMORANDUM IN SUPPORT OF THE MOTION OF THE GUERRERA GROUP
FOR CONSOLIDATION, APPOINTMENT AS LEAD PLAINTIFF AND FOR
APPROVAL OF SELECTION OF LEAD AND LIAISON COUNSEL**

DAVID DUBROW, Individually and on behalf of all
others Similarly Situated,

Plaintiff,

V.

NETWORK ENGINES, INC., JOHN CURTIS,
DOUGLAS G. BRYANT and LAWRENCE A.
GENOVESI,

Defendants.

KEVIN DENHA, Individually and On behalf of all
others similarly situated,

Plaintiff,

V.

NETWORK ENGINES, INC., JOHN CURTIS,
DOUGLAS G. BRYANT and LAWRENCE A.
GENOVESI,

Defendants.

WING KAM YU, on behalf of himself and all others
similarly situated,

Plaintiff,

V.

NETWORK ENGINES, JOHN CURTIS and
DOUGLAS G. BRYANT,

Defendants.

HERBERT A. REITZEL, on behalf of himself and others)	
similarly situated,)	Civil Action 1:04 cv 10288 JLT
)	
Plaintiff,)	
)	
v.)	
)	
NETWORK ENGINES, INC., JOHN CURTIS,)	
DOUGLAS G. BRYANT and LAWRENCE A.)	
GENOVESI,)	
)	
Defendants.)	

PRELIMINARY STATEMENT

Presently pending before this Court are six-related securities class action lawsuits (the "Actions") brought on behalf of all those who purchased or otherwise acquired Network Engines, Inc. ("Network Engines" or the "Company") shares between November 6, 2003 and December 10, 2003, inclusive (the "Class Period") and allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA") (15 U.S.C. § 78(j)(b) and 78(t)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

Class Members Sergio and Ricardo Guerrero, Donald Drew and Thomas W. Jackson (the "Guerrera Group") hereby move this Court for an order to: (i) consolidate the Actions; (ii) appoint the Guerrero Group as Lead Plaintiff in the Actions under Section 21D(a)(3)(B) of the Exchange Act; and (iii) approve the Guerrero Group's selection of the law firm of Cauley Geller Bowman & Rudman, LLP ("Cauley Geller") to serve as Lead Counsel and the law firm of Shapiro, Haber & Urmy ("Shapiro Haber") to serve as Liaison Counsel.

This motion is made on the grounds that the Guerrero Group is the most adequate plaintiff, as defined by the PSLRA. The Guerrero Group collectively suffered losses of \$152,899.28 in connection with its purchases of shares of Network Engines stock during the Class Period.¹ See Hess-Mahan Decl. Ex. B.² In addition, the Guerrero Group, for the purposes

¹ The losses suffered by the Guerrero Group are not the same as its legally compensable damages, measurement of which is often a complex legal question which cannot be determined at this stage of the litigation. The approximate losses can, however, be determined from the certifications required under Section 21D of the Exchange Act and based upon reference to information concerning the current market for the Company's securities. The Guerrero Group's transactions in Network Engines shares are set forth in the accompanying loss chart.

² References to the "Hess-Mahan Decl., Ex. __" are to the exhibits attached to the accompanying Declaration of Theodore M. Hess-Mahan dated February 17, 2003 and submitted

of this motion, adequately satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure in that its claims are typical of the claims of the putative class and that it will fairly and adequately represent the interests of the class.

FACTUAL BACKGROUND³

Network Engines, Inc. develops, manufactures and distributes server appliances that enable network equipment providers and independent software vendors to deliver data storage and security networking applications to their customers. The Company is focused on providing its strategic partners with server appliance hardware, integration services and appliance development, manufacturing, fulfillment, distribution and post-sale support to allow these strategic partners to deliver turnkey solutions to their end user customers.

The complaint alleges that by the start of the Class Period, defendants knew, but failed to disclose, that Network Engines was in the process of renegotiating its distribution contract with EMC, and that EMC was demanding price reductions, which, if agreed to, would negatively impact the Company's future financial results. Nevertheless, throughout the Class Period, defendants issued positive statements highlighting the Company's strong financial performance, continued growth and the success of its relationship with EMC, its largest customer. Defendants failed to disclose, however: (i) that the Company was in the process of renegotiating its distribution contract with EMC; (ii) that EMC was demanding price concessions to bring its agreement with Network Engines in line with the pricing that Network Engines was providing to

herewith.

³ These facts are drawn from the allegations in the complaint captioned Timothy Morgan v. Network Engines, Inc., et al., 1:03cv12529 (JLT) (the “Morgan Action”).

other customers; (iii) that the new distribution contract with EMC would negatively impact the Company's future financial performance; (iv) that the Company would not be able to sustain the growth in its gross margins as a result of the amended contract; and (v) as a result, the Company's positive statements issued during the Class Period were materially false and misleading when made.

Finally, on December 10, 2003, the Company announced, among other things, that it had renegotiated its distribution contract with EMC and the amended contract would negatively impact the Company's gross profit related to the sale of EMC-approved Host Bus Adapters and the Company's distribution operations gross profit.

Following this announcement, shares of Network Engines common stock fell \$3.92 per share, or 39%, to close at \$6.10 per share, on extraordinarily high trading volume, and have continued to decline since that time.

ARGUMENT

POINT I

THE ACTIONS SHOULD BE CONSOLIDATED FOR ALL PURPOSES

The Actions each assert class claims on behalf of the purchasers of Network Engines shares for alleged violations of the Exchange Act during the relevant time period. The Actions name virtually the same defendants and involve the same factual and legal issues. They are each brought by investors who purchased Network Engines shares during the relevant time period in reliance on the integrity of the market for such securities and were injured by the fraud on the market that was perpetrated through the issuance of materially false and misleading statements

and concealment of material information, thus artificially inflating the prices of Network Engines common stock at all relevant times. Consolidation is appropriate where there are actions involving common questions of law or fact. Fed. R. Civ. P. 42 (a). See Johnson v. Celotex Corp., 899 F.2d 1281, 1284 (3d Cir.) (1990). That test is met here and, accordingly, the Actions should be consolidated.

POINT II

THE GUERRERA GROUP SHOULD BE APPOINTED LEAD PLAINTIFF

A. The Procedure Required By The PSLRA

The PSLRA has established a procedure that governs the appointment of a Lead Plaintiff in "each private action arising under the [Securities Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(1) and (a)(3)(B)(i).

First, the plaintiff who files the initial action must publish a notice to the class, within 20 days of filing the action, informing class members of their right to file a motion for appointment as Lead Plaintiff. 15 U.S.C. §§ 78u-4(a)(3)(A)(i). Plaintiff in the Morgan action caused the first notice regarding the pendency of these actions to be published on PR Newswire, a national, business-oriented newswire service, on December 16, 2003. See Hess-Mahan Decl. Ex. A. Within 60 days after publication of the notice, any person or group of persons who are members of the proposed class may apply to the Court to be appointed as Lead Plaintiff, whether or not they have previously filed a complaint in the action. 15 U.S.C. §§ 78u-4(a)(3)(A) and (B).

Second, the PSLRA provides that, within 90 days after publication of the notice, the

Court shall consider any motion made by a class member and shall appoint as Lead Plaintiff the member or members of the class that the Court determines to be most capable of adequately representing the interests of class members. 15 U.S.C. § 78u-4(a)(3)(B). In determining the "most adequate plaintiff," the PSLRA provides that:

[T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this Act is the person or group of persons that

(aa) has either filed the complaint or made a motion in response to a notice...

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. 78u-4(a)(3)(B)(iii). See generally Greebel v. FTP Software, 939 F. Supp. 57, 64 (D. Mass. 1996).

B. The Guerrera Group Satisfies the "Lead Plaintiff" Requirements Of The Exchange Act

1. The Guerrera Group Has Complied With The Exchange Act And Should Be Appointed Lead Plaintiff

The time period in which class members may move to be appointed Lead Plaintiff herein under 15 U.S.C. § 78u-4(a)(3)(A) and (B) expires on February 17, 2003. Pursuant to the provisions of the PSLRA and within the requisite time frame after publication of the required notice (published on December 16, 2003), the Guerrera Group timely moves this Court to be appointed Lead Plaintiff on behalf of all members of the class.

The members of the Guerrera Group have duly signed and filed certifications stating that

they are willing to serve as representative parties on behalf of the class. See Hess-Mahan Decl. Ex. C. In addition, the Guerrero Group has selected and retained competent counsel to represent them and the class. See Hess-Mahan Decl. Exs. D-E. Accordingly, the Guerrero Group has satisfied the individual requirements of 15 U.S.C. § 78u-4(a)(3)(B) and is entitled to have its application for appointment as Lead Plaintiff and selection of Lead and Liaison Counsel as set forth herein, considered and approved by the Court.

2. The Guerrero Group Has The Requisite Financial Interest In The Relief Sought By The Class

During the Class Period, as evidenced by, among other things, the accompanying signed certifications, see Hess-Mahan Decl. Ex. C., the Guerrero Group purchased shares of Network Engines stock in reliance upon the materially false and misleading statements issued by the defendants and was injured thereby. In addition, the Guerrero Group collectively incurred a substantial \$152,899.28 loss on its transactions in Network Engines shares. The Guerrero Group thus has a significant financial interest in this case. Therefore, the Guerrero Group satisfies all of the PSLRA's prerequisites for appointment as Lead Plaintiff in this action and should be appointed Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(3)(B).

3. The Guerrero Group Otherwise Satisfies Rule 23

According to 15 U.S.C. § 78u-4(a)(3)(B), in addition to possessing the largest financial interest in the outcome of the litigation, the Lead Plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of

law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Of the four prerequisites to class certification, only two -- typicality and adequacy -- directly address the personal characteristics of the class representative. Consequently, in deciding a motion to serve as Lead Plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the Lead Plaintiff moves for class certification. Lax v. First Merchants Acceptance Corp., 1997 U.S. Dist. LEXIS 11866 at *20, (N.D. Ill. Aug. 6, 1997); Fischler v. Amsouth Bancorporation, No. 96-1567-Civ -T-17A, 1997 U.S. Dist. LEXIS 2875, at *7-8 (M.D. Fla. Feb. 6, 1997). The Guerrera Group satisfies both the typicality and adequacy requirements of Rule 23, thereby justifying its appointment as Lead Plaintiff.

Under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of those of the class. Typicality exists where the plaintiffs' claims arise from the same series of events and are based on the same legal theories as the claims of all the class members. See Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 598 (2d Cir. 1986). Typicality does not require that there be no factual differences between the class representatives and the class members because it is the generalized nature of the claims asserted which determines whether the class representatives are typical. See Priest v. Zayre Corp., 118 F.R.D. 552, 555 (D. Mass. 1988) ("With respect to typicality under Rule 23(a)(3), plaintiffs need not show substantial identity between their claims and those of absent class members, but need only show that their claims arise from the same course of conduct that gave rise to the claims of the absent [class] members")

(citations omitted). The requirement that the proposed class representatives' claims be typical of the claims of the class does not mean, however, that the claims must be identical. Phillips v. Joint Legislative Comm. on Performance & Expenditure Review, 637 F.2d 1014, 1024 (5th Cir. 1981).

The Guerrero Group satisfies this requirement because, just like all other class members, it: (1) purchased Network Engines shares during the Class Period; (2) purchased Network Engines shares in reliance upon the allegedly materially false and misleading statements issued by defendants; and (3) suffered damages thereby. Thus, the Guerrero Group's claim is typical of those of other class members since its claim and the claims of other class members arise out of the same course of events.

Under Rule 23(a)(4) the representative parties must also "fairly and adequately protect the interests of the class." The PSLRA directs this Court to limit its inquiry regarding the adequacy of the Guerrero Group to represent the class to the existence of any conflicts between the interests of the Guerrero Group and the members of the class. The standard for adequacy of representation under Rule 23(a)(4) is met by: (1) the absence of potential conflict between the named plaintiffs and the class members; and (2) the class representatives' choice of counsel who is qualified, experienced and able to vigorously conduct the proposed litigation. Modell v. Eliot Sav. Bank, 139 F.R.D. 17, 23 (D. Mass. 1991) (citing Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985)).

Here, the Guerrero Group is an adequate representative of the class. As evidenced by the injuries suffered by the Guerrero Group, who purchased Network Engines shares at prices

allegedly artificially inflated by defendants' materially false and misleading statements, the interest of the Guerrero Group is clearly aligned with the members of the class, and there is no evidence of any antagonism between the Guerrero Group's interest and those of the other members of the class. Further, the members of the Guerrero Group have taken significant steps which demonstrate that they will protect the interests of the class: they have retained competent and experienced counsel to prosecute these claims. In addition, as shown below, the Guerrero Group's proposed Lead and Liaison Counsel are highly qualified, experienced and able to conduct this complex litigation in a professional manner. Thus, the Guerrero Group prima facie satisfies the commonality, typicality and adequacy requirements of Rule 23 for the purposes of this motion.

POINT III

THE COURT SHOULD APPROVE THE GUERRERA GROUP'S CHOICE OF COUNSEL

Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), the proposed lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class he seeks to represent. In that regard, the Guerrero Group has selected the law firm of Cauley Geller as Lead Counsel and the law firm of Shapiro Haber as Liaison Counsel, firms which have substantial experience in the prosecution of shareholder and securities class actions. See Hess-Mahan Decl. Exs. D-E. Accordingly, the Court should approve the Guerrero Group's selection of counsel.

CONCLUSION

For all the foregoing reasons, the Guerrera Group respectfully requests that the Court: (i) consolidate the Actions; (ii) appoint the Guerrera Group as Lead Plaintiff in the Actions; (iii) approve its selection of Lead and Liaison Counsel as set forth herein; and (iv) grant such other relief as the court may deem just and proper.

DATED: February 17, 2003

Respectfully submitted,

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